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# Supreme Court of the United States

No. 9. October Term, 1951.

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH  
OF HAWTHORNE and THE STATE OF NEW  
JERSEY,

*Appellees.*

APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY.

**SUPPLEMENT TO APPELLEES' STATEMENT  
OPPOSING JURISDICTION AND MOTION  
TO DISMISS OR AFFIRM.**

THEODORE D. PARSONS,  
*Attorney General of New Jersey.*

HENRY F. SCHENK,  
*Deputy Attorney General of New  
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ALEXANDER E. FASOLI,  
*Counsel for Appellees.*



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## **SUPPLEMENT TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.**

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### **PRELIMINARY STATEMENT.**

At the hearing of the cause, before this Honorable Court on January 31, 1952, upon motion duly made, leave was granted to file a statement, supplemental to appellees' statement opposing jurisdiction.

### **MATTERS AND GROUNDS MAKING AGAINST JURISDICTION.**

#### **I.**

Appellees, Board of Education of the Borough of Hawthorne and The State of New Jersey, incorporate herein by reference and make a part hereof the entire argument set forth in Appellees' statement opposing jurisdiction and motion to dismiss or affirm, filed in the cause and which is designated as No. 556, October Term, 1950.

## II.

Appellants have not shown sufficient injury or damage to raise a substantial justiciable controversy either under State or Federal law.

All factual matters in the cause having been admitted, appellants failed to show that they have given rise to an actual controversy, one which is justiciable in nature.

It is equally clear that to obtain a declaratory judgment both in the courts of the State of New Jersey and in the Federal courts, there must be a justiciable difference, subject to action in a court of justice as distinguished from a mere disagreement or debate.

The law is well settled in the State of New Jersey that the power granted courts to declare rights, statutes and other legal relations, and particularly to determine any question of construction or validity arising under a statute, is circumscribed by the salutary qualification that the jurisdiction of the courts may not be invoked in absence of an actual controversy. The first point to be considered in any proceeding for a declaratory judgment is whether or not the controversy that is presented in the briefs and at the oral argument is actual and bona fide or is merely one in which the semblance of judicial proceedings and the form of due process are present. *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235 (N. J. S. C., 1949).

Examination of the record in the case at bar clearly discloses the absence of a justiciable controversy. The New Jersey Supreme Court said in its opinion through Case, J., "No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is 'a citizen and taxpayer'; the only interest he asserts is just



that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work. The other plaintiff, in addition to being a citizen and a taxpayer, has a daughter, aged seventeen, who is a student of the school. Those facts are asserted, but, as in the case of the co-plaintiff, no violated rights are urged. It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality (fol. 38) of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiffs-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. Cf. *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235; *Massachusetts vs. Mellon*, 262 U. S. 447, at 488, 67 Law Ed. 1078, at 1085, 43 Sup. Ct. 597 (1923). The point has substance but we have nevertheless concluded to dispose of the appeal on its merits." Record 24 and 25.

As recently as 1950 this Honorable Court, speaking through Burton, J., said, "The touchstone to justiciability is injury to a legally protected right . . . ." *Joint Antifacist Refugee Committee vs. McGrath*, 341 U. S. 123, at 140; 95 Law Ed. 817. Pointed out in Appellees' statement making against jurisdiction, "No injury to a legally protected right has been shown by either of the Appellants."

Appellees strongly feel that it is evident from the transcript of the record that Appellants have failed to show justiciable issue, damage, injury, or a religious belief or disbelief which was adversely affected by the State statute under examination. It is, therefore, urged by Appellees

that the cause before this Honorable Court be dismissed for the reasons set forth herein and in Appellees' statement making against jurisdiction heretofore filed.

Respectfully submitted, .

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*Attorney General of New Jersey.*

HENRY F. SCHENK,  
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ALEXANDER E. TASOLI,  
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